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No. 78-1440

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM ROSE AND ROBERT PETERSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 590 F. 2d 232.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on December 20, 1978, and a petition for rehearing was denied on February 23, 1979 (Pet. App. B). The petition for a writ of certiorari was filed on March 19, 1979. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioners' convictions for conspiracy.

2. Whether a party to a taped telephone conversation may testify to the contents of that conversation where the tape recording was inadvertently lost by the government prior to trial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to transport stolen goods valued at $5,000 or more in interstate commerce, in violation of 18 U.S.C. 371. Each was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App. A).

On October 7, 1975, James Srbinovich, in the presence of two Special Agents of the Drug Enforcement Administration, telephoned petitioner Rose, whom Srbinovich had known for 15 or 20 years. Srbinovich told Rose that he was in Albuquerque,[1] and Rose responded that he wanted to talk to Srbinovich right away, that he had "something" for him, and that they "went on it once before."[2] When Srbinovich said he had no money, Rose promised to wire him $500 "because this thing has to go over the weekend." Government agents later collected the wired money (Tr. 15-23, 220, 224).

Srbinovich met with Rose in Chicago three days later and discussed a burglary to be committed in Scottsdale, Arizona. According to Rose's plan,

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[1]At the time Srbinovich was actually incarcerated in the McHenry County Jail in Woodstock, Illinois (Tr. 20).

[2]Srbinovich had met with petitioners previously to discuss the commission of a burglary in Arizona (Tr. 110-112, 288-289, 293-299).

Srbinovich and a partner would actually execute the burglary and receive two-thirds of the take, and Rose and the "tipster" in Arizona, petitioner Peterson, would divide the remaining one-third. Rose estimated the valuables to be worth $200,000. A few days later Rose told Srbinovich and his "partner," DEA agent Darrell Skaggs, that Peterson would give them the layout of the house and further instructions in Scottsdale, Arizona. Rose also told them to return to Chicago with the stolen goods, because Peterson, a real estate agent, had sold the house to the intended victim and would be an obvious suspect. Rose said he had a purchaser for the goods and had been planning the burglary for a long time (Tr. 33-40, 224-228, 284).

Several days after they arrived in Scottsdale, Srbinovich and Skaggs met with Peterson, and the latter described the house and surrounding area, the burglar alarm system, and the valuables they planned to steal. They met several more times, and Peterson drove them to the house to look it over. He told them to take the valuables out of Arizona after the theft (Tr. 83-103, 229-231, 296-328).

On the day the burglary was to take place, October 20, 1975, FBI agents photographed various pieces of jewelry and art in the house. Srbinovich reported to petitioners that the burglary was successful. He and Skaggs returned to Chicago the following day and showed the photographs to Rose. After two days of haggling over the price to be paid Srbinovich and Skaggs, Rose agreed to $10,000. Rose was arrested at a meeting at which the goods were to be exchanged for the $10,000. Peterson was later arrested in Arizona (Tr. 103, 105-110, 329, 334-337).

ARGUMENT

1. Petitioners' two challenges to their conspiracy convictions were correctly answered in the court of appeals' opinion.

a. Petitioners first contend that the government failed to prove a conspiracy because each overt act involved the government. The evidence, however, was sufficient to show a conspiracy between Rose and Peterson to cause the theft of valuables from a house in Arizona and the transportation of those valuables from Arizona to Illinois. Although Srbinovich initially contacted Rose, the evidence demonstrated that the burglary scheme was conceived and orchestrated by Rose and Peterson. There were numerous overt acts proved at trial, including Rose's wiring $500 to Srbinovich and both Rose's and Peterson's meetings and conversations with Srbinovich. It is well settled that an overt act, taken by itself, need not be criminal in character. See *Yates* v. *United States,* 354 U.S. 298, 334 (1957); *Braverman* v. *United States,* 317 U.S. 49, 53 (1942); *United States* v. *Rabinowich,* 238 U.S. 78, 86 (1915). "The function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work', and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." *Yates* v. *United States, supra,* 354 U.S. at 334 (citation omitted). The meetings, conversations, and the act of wiring $500 amply demonstrated that petitioners were actively seeking to bring about the interstate transportation of stolen goods in violation of 18 U.S.C. 2314. In the absence of an entrapment defense, which

petitioners have never raised,[3] it is immaterial that the government participated in the conspiracy, so long as the nongovernmental parties agreed to violate a federal statute and committed an overt act to that end. Cf. *United States* v. *Rueter,* 536 F. 2d 296 (9th Cir. 1976).

b. Petitioners' claim that the conspiracy conviction cannot stand because the theft was not completed and Srbinovich never intended to complete it is likewise without merit. "The agreement is punishable whether or not the contemplated crime is consummated." *United States* v. *Bayer,* 331 U.S. 532, 542 (1947). See also *United States* v. *Rabinowich, supra*; *United States* v. *Reuter, supra; United States* v. *Rosner,* 485 F. 2d 1213, 1228-1229 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974). Cf. *Dennis* v. *United States,* 384 U.S. 855, 866 (1966). The mere fact that the agents did not intend to carry out the theft does not alter the fact that petitioners agreed that the goods would be stolen and then transported to Chicago. See *United States* v. *Rueter, supra.* Likewise, there is no need—in a conspiracy case such as this—to prove that the petitioners conspired to transport goods in interstate commerce " 'knowing the same to have been stolen' " (Pet. 6). It is enough that the essential nature of the plan was to steal goods and to ship them in interstate commerce with knowledge that they were to be stolen. This is exactly what petitioners conspired to do. See *Carlson* v. *United States,* 187 F. 2d 366, 369370 (10th Cir. 1951).

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[3] Petitioners did not put on any evidence at trial; nor did they request an entrapment instruction. In view of their manifest predisposition to commit the offense, it is apparent that no entrapment defense was available.

United States v. *Rosenblatt*, 554 F. 2d 36 (2d Cir. 1977), on which petitioners rely, supports the holding below. In that case, Rosenblatt thought he was conspiring to abet tax evasion in violation of 26 U.S.C. 7201 and was completely unaware that the conspiracy really was directed to falsifying postal records in violation of 18 U.S.C. 2073. The Second Circuit held that he could not be convicted of a conspiracy to falsify postal records because, in his mind, that was not the "essential nature of the plan." 554 F. 2d at 38-39. In contrast, petitioners knew that the essential nature of the plan was to violate 18 U.S.C. 2314.

2. Prior to trial, the government lost the tape recording of Srbinovich's initial telephone call to Rose (Tr. 24-32, 191-194, 337-339). Petitioners contend that Srbinovich should not have been permitted to testify to the contents of the conversation because the recording was the "best evidence" of that conversation. The best evidence rule, Rule 1002, Fed. R. Evid., however, only precludes an attempt to prove the *contents* of a writing or recording through testimony or other secondary sources rather than by introducing the writing or recording itself. The rule never prevents an eye-witness from testifying to his personal recollection of an event. It is immaterial that the event may also have been photographed, recorded, or summarized in a memorandum. *United States* v. *Gonzales-Benitez*, 537 F. 2d 1051, 1053 (9th Cir.), cert. denied, 429 U.S. 923 (1976); *United States* v. *Conway*, 507 F. 2d 1047, 1052 (5th Cir. 1975); *United States* v. *White*, 223 F. 2d 674, 675 (2d Cir. 1955). Srbinovich, a party to the conversation, and DEA Agent Lance Mrock, a witness to the conversation, were competent to give their recollection of the conversation. Furthermore, both

courts below accepted (see Pet. App. 10) the government's representation that the loss of the tape was inadvertent. There is no reason to overturn these factual findings (*Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967)), and infer, as petitioners suggest (Pet. 8), that the government intentionally withheld or recklessly destroyed the tape because it contained exculpatory evidence. Finally, as the court of appeals correctly noted (Pet. App. 10), the details of Srbinovich's and Mrock's recollection of the conversation were corroborated by other evidence.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]The court of appeals properly rejected (Pet. App. 10-11) petitioners' proffered jury instruction to the effect that the government's failure to produce the tape required a presumption that the tape would not corroborate Srbinovich and Mrock's testimony. As the court noted (*id.* at 11), the instruction was argumentative and would have exaggerated the importance of the loss of the tape.

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